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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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**U.S. Citizenship
and Immigration
Services**

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FILE:



Office: NEBRASKA SERVICE CENTER

Date: **FEB 08 2011**

IN RE:

Petitioner:

Beneficiary:



PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the employment-based immigrant visa petition, which is now before the Administrative Appeals Office (AAO) on appeal. The petition will be remanded to the director in accordance with the following.

The petitioner is a software developer and IT support company. It seeks to employ the beneficiary permanently in the United States as a programmer analyst pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). As required by statute, an ETA Form 9089 Application for Alien Employment Certification approved by the Department of Labor (DOL), accompanied the petition. Upon reviewing the petition, the director determined that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Specifically, the director determined that the petitioner did not establish that the beneficiary possessed the requisite education at the time the labor certification was submitted as the petitioner did not submit evidence that a degree was conferred.

On appeal, the petitioner submitted a copy of the beneficiary's diplomas evidencing his completion of a foreign Bachelor's and Master's of Commerce degree and letters concerning the beneficiary's experience.

The record shows that the appeal is properly filed and timely and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary.

In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.¹

The beneficiary possesses a foreign three-year bachelor's degree and a two-year master's degree from the [REDACTED]. Although the petitioner submitted copies of documents relating to the beneficiary's education with the original submission and in response to the director's request for evidence including statements of marks and evidence that the beneficiary completed exams, the

¹ The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by the regulation at 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

beneficiary's actual diplomas from the [REDACTED] were submitted for the first time on appeal. The petitioner states that the beneficiary did not have the actual diplomas in his possession and that the beneficiary was unable to obtain the diplomas based on country conditions arising from the November 2008 "[REDACTED] attacks." The director denied the petition, in part, due to the lack of evidence that the beneficiary actually received the degrees claimed.

As noted above, the ETA Form 9089 in this matter is certified by DOL. DOL's role is limited to determining whether there are sufficient workers who are able, willing, qualified and available and whether the employment of the alien will adversely affect the wages and working conditions of workers in the United States similarly employed. Section 212(a)(5)(A)(i) of the Act; 20 C.F.R. § 656.1(a).

It is significant that none of the above inquiries assigned to DOL, or the remaining regulations implementing these duties under 20 C.F.R. § 656, involve a determination as to whether or not the alien is qualified for a specific immigrant classification or even the job offered. This fact has not gone unnoticed by federal circuit courts. *See Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F. 2d 1305, 1309 (9th Cir. 1984); *Madany v. Smith*, 696 F.2d 1008, 1012-1013 (D.C. Cir. 1983).

Rather, the AAO is bound by the Act, agency regulations, precedent decisions of the agency and published decisions from the circuit court of appeals from whatever circuit that the action arose. *See N.L.R.B. v. Ashkenazy Property Management Corp.*, 817 F.2d 74, 75 (9th Cir. 1987) (administrative agencies are not free to refuse to follow precedent in cases originating within the circuit); *R.L. Inv. Ltd. Partners v. INS*, 86 F. Supp. 2d 1014, 1022 (D. Haw. 2000), *aff'd* 273 F.3d 874 (9th Cir. 2001) (unpublished agency decisions and agency legal memoranda are not binding under the APA, even when they are published in private publications or widely circulated).

A United States baccalaureate degree is generally found to require four years of education. *Matter of Shah*, 17 I&N Dec. 244 (Reg'l. Comm'r. 1977). This decision involved a petition filed under 8 U.S.C. §1153(a)(3) as amended in 1976. At that time, this section provided:

Visas shall next be made available . . . to qualified immigrants who are members of the professions

The Act added section 203(b)(2)(A) of the Act, 8 U.S.C. §1153(b)(2)(A), which provides:

Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent

Significantly, the statutory language used prior to *Matter of Shah*, 17 I&N Dec. at 244, is identical to the statutory language used subsequent to that decision but for the requirement that the immigrant hold an advanced degree or its equivalent. The Joint Explanatory Statement of the Committee of Conference, published as part of the House of Representatives Conference Report on the Act, provides that "[in] considering equivalency in category 2 advanced degrees, it is anticipated that the alien must have a bachelor's degree with at least five years progressive experience in the

professions.” H.R. Conf. Rep. No. 955, 101st Cong., 2nd Sess. 1990, 1990 U.S.C.C.A.N. 6784, 1990 WL 201613 at *6786 (Oct. 26, 1990).

At the time of enactment of section 203(b)(2) of the Act in 1990, it had been almost thirteen years since *Matter of Shah* was issued. Congress is presumed to have intended a four-year degree when it stated that an alien “must have a bachelor’s degree” when considering equivalency for second preference immigrant visas. We must assume that Congress was aware of the agency’s previous treatment of a “bachelor’s degree” under the Act when the new classification was enacted and did not intend to alter the agency’s interpretation of that term. See *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of administrative and judicial interpretations where it adopts a new law incorporating sections of a prior law). See also 56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (an alien must have at least a bachelor’s degree).

In 1991, when the final rule for 8 C.F.R. § 204.5 was published in the Federal Register, the Immigration and Naturalization Service (the Service), responded to criticism that the regulation required an alien to have a bachelor’s degree as a minimum and that the regulation did not allow for the substitution of experience for education. After reviewing section 121 of the Immigration Act of 1990, Pub. L. 101-649 (1990), and the Joint Explanatory Statement of the Committee of Conference, the Service specifically noted that both the Act and the legislative history indicate that an alien must have at least a bachelor’s degree:

The Act states that, in order to qualify under the second classification, alien members of the professions must hold “advanced degrees or their equivalent.” As the legislative history . . . indicates, the equivalent of an advanced degree is “a bachelor’s degree with at least five years progressive experience in the professions.” Because neither the Act nor its legislative history indicates that bachelor’s or advanced degrees must be United States degrees, the Service will recognize foreign equivalent degrees. But both the Act and its legislative history make clear that, in order to qualify as a professional under the third classification or to have experience equating to an advanced degree under the second, *an alien must have at least a bachelor’s degree.*

56 Fed. Reg. 60897, 60900 (Nov. 29, 1991) (emphasis added).

There is no provision in the statute or the regulations that would allow a beneficiary to qualify under section 203(b)(2) of the Act as a member of the professions holding an advanced degree with anything less than a full baccalaureate degree. More specifically, a three-year bachelor’s degree will not be considered to be the “foreign equivalent degree” to a United States baccalaureate degree. *Matter of Shah*, 17 I&N Dec. at 245. Where the analysis of the beneficiary’s credentials relies on work experience alone or a combination of multiple lesser degrees, the result is the “equivalent” of a bachelor’s degree rather than a “foreign equivalent degree.”² In order to have experience and

² Compare 8 C.F.R. § 214.2(h)(4)(iii)(D)(5) (defining for purposes of a nonimmigrant visa classification, the “equivalence to completion of a college degree” as including, in certain cases, a specific combination of education and experience). The regulations pertaining to the immigrant

education equating to an advanced degree under section 203(b)(2) of the Act, the beneficiary must have a single degree that is the “foreign equivalent degree” to a United States baccalaureate degree. 8 C.F.R. § 204.5(k)(2). As explained in the preamble to the final rule, persons who claim to qualify for an immigrant visa by virtue of education or experience equating to a bachelor’s degree may qualify for a visa pursuant to section 203(b)(3)(A)(i) of the Act as a skilled worker with more than two years of training and experience. 56 Fed. Reg. at 60900.

For this classification, advanced degree professional, the regulation at 8 C.F.R. § 204.5(k)(3)(i)(B) requires the submission of an “official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree.” For classification as a member of the professions, the regulation at 8 C.F.R. § 204.5(l)(3)(ii)(C) requires the submission of “an official college or university record showing the date the baccalaureate degree was awarded and the area of concentration of study.” We cannot conclude that the evidence required to demonstrate that an alien is an advanced degree professional is any less than the evidence required to show that the alien is a professional. To do so would undermine the congressionally mandated classification scheme by allowing a lesser evidentiary standard for the more restrictive visa classification. Moreover, the commentary accompanying the proposed advanced degree professional regulation specifically states that a “baccalaureate means a bachelor’s degree received *from a college or university*, or an equivalent degree.” (Emphasis added.) 56 Fed. Reg. 30703, 30306 (July 5, 1991). Cf. 8 C.F.R. § 204.5(k)(3)(ii)(A) (relating to aliens of exceptional ability requiring the submission of “an official academic record showing that the alien has a degree, *diploma, certificate or similar award* from a college, university, *school or other institution of learning* relating to the area of exceptional ability”).

Relying in part on *Madany*, 696 F.2d at 1008, the U.S. Federal Court of Appeals for the Ninth Circuit (Ninth Circuit) stated:

[I]t appears that the DOL is responsible only for determining the availability of suitable American workers for a job and the impact of alien employment upon the domestic labor market. It does not appear that the DOL’s role extends to determining if the alien is qualified for the job for which he seeks sixth preference status. That determination appears to be delegated to the INS under section 204(b), 8 U.S.C. § 1154(b), as one of the determinations incident to the INS’s decision whether the alien is entitled to sixth preference status.

K.R.K. Irvine, Inc. v. Landon, 699 F.2d 1006, 1008 (9th Cir. 1983). The court relied on an amicus brief from DOL that stated the following:

The labor certification made by the Secretary of Labor ... pursuant to section 212(a)(5) of the ... [Act] ... is binding as to the findings of whether there are able, willing, qualified, and available United States workers for the job offered to the alien, and whether employment of the alien under the terms set by the employer would adversely affect the wages and working conditions of similarly employed United

classification sought in this matter do not contain similar language.

States workers. *The labor certification in no way indicates that the alien offered the certified job opportunity is qualified (or not qualified) to perform the duties of that job.*

(Emphasis added.) *Id.* at 1009. The Ninth Circuit, citing *K.R.K. Irvine, Inc.*, 699 F.2d at 1006, revisited this issue, stating: “The INS, therefore, may make a de novo determination of whether the alien is in fact qualified to fill the certified job offer.” *Tongatapu*, 736 F. 2d at 1309.

The key to determining the job qualifications is found on ETA Form 9089 Part H. This section of the application for alien labor certification, “Job Opportunity Information,” describes the terms and conditions of the job offered. It is important that the ETA Form 9089 be read as a whole.

Moreover, when determining whether a beneficiary is eligible for a preference immigrant visa, USCIS may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany*, 696 F.2d at 1015. USCIS must examine “the language of the labor certification job requirements” in order to determine what the job requires. *Id.* The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to examine the certified job offer *exactly* as it is completed by the prospective employer. *See Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984) (emphasis added). USCIS’s interpretation of the job’s requirements, as stated on the labor certification must involve reading and applying *the plain language* of the alien employment certification application form. *See id.* at 834. USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification that DOL has formally issued or otherwise attempt to divine the employer’s intentions through some sort of reverse engineering of the labor certification.

In this matter, Part H, line 4 reflects that the minimum level of education is a Master’s degree and line 8-A, of the labor certification reflects that the petitioner would accept a bachelor’s degree in combination with five years of experience as the stated and certified alternate education and experience. Line 9 reflects that a foreign educational equivalent is acceptable. Line 4-B indicates that the required field of study is Computer Science and line 7-A indicates that the petitioner would also accept the alternate fields of study in Business Administration or Commerce.

The petitioner here relies upon the conclusion of three credential evaluations that differ slightly in their conclusions. The first credential evaluation is from [REDACTED] Corporation³ which concludes that the beneficiary holds the equivalent of a master’s degree in business administration. [REDACTED] conclusion is based on the beneficiary’s Bachelor of Commerce and Master of Commerce degrees considered together. [REDACTED] states that the beneficiary’s Bachelor of Commerce degree is equivalent to three years of university study. The evaluation contains no assignment of credits for individual courses taken by the beneficiary and otherwise contains no reasoning underlying the conclusion that the beneficiary holds the equivalent

³ [REDACTED] indicates that he holds an M.B.A. from [REDACTED] and [REDACTED] from the [REDACTED]

of six-years of study equivalent to a U.S. Master's degree. Instead, he generally states his conclusion based on the reputation of his educational institutions, "the number of years of coursework, the nature of the coursework, the grades attained in the courses, and the hours of academic coursework." No explanation appears in the evaluation as to how these factors weighed in on [REDACTED] ultimate conclusion. [REDACTED] does not state that the beneficiary's education separately meets any U.S. bachelor's degree foreign equivalency.

The second credential evaluation from [REDACTED] Services⁴ concludes that the beneficiary has the equivalent of a bachelor's degree in computer information systems. He bases his conclusion on the combination of the beneficiary's three-year bachelor's and two-year master's degree, study at the [REDACTED] over the course of two years, and two training courses with [REDACTED] and [REDACTED]. [REDACTED] does not assign credits for individual courses or otherwise contain reasoning underlying his conclusion. Computer Information Systems is not a stated field of study on the labor certification. Further, the petitioner may not rely on an "equivalent" degree to meet the terms of the labor certification or in the advanced degree category.

The third credential evaluation is from [REDACTED] [REDACTED] indicates that the beneficiary holds the equivalent of a Bachelor's degree and a Master's degree in Business Administration based on the beneficiary's degrees from the [REDACTED]. [REDACTED] includes no explanation as to how five years of study at the [REDACTED] would be equivalent to six years of study leading to the foreign equivalent of a U.S. Master's degree at a U.S. institution. In addition, [REDACTED] does not undertake a course evaluation or otherwise state reasons for his conclusion.

Because of the discrepancy in the evaluations, we have reviewed the [REDACTED] created by the [REDACTED]. According to its website, [REDACTED] is "a nonprofit, voluntary, professional association of more than 10,000 higher education admissions and registration professionals who represent approximately 2,500 institutions in more than 30 countries." Its mission "is to provide professional development, guidelines and voluntary standards to be used by higher education officials regarding the best practices in records management, admissions, enrollment management, administrative information technology and student services." According to the

⁴ [REDACTED] indicates that he holds a Ph.D. in Higher Education from [REDACTED] and a Master's degree in Computer Science from [REDACTED].

⁵ [REDACTED] indicates that he received a Bachelor's of Science and a Master's of Science from [REDACTED] and a Master's and Ph.D. from [REDACTED].

⁶ In *Confluence Intern., Inc. v. Holder*, 2009 WL 825793 (D.Minn. March 27, 2009), the District Court in Minnesota determined that the AAO provided a rational explanation for its reliance on information provided by the [REDACTED] to support its decision.

registration page for EDGE, <http://aacraoedge.aacrao.org/register/index/php>, EDGE is “a web-based resource for the evaluation of foreign educational credentials.” Authors for EDGE work with a publication consultant and a Council Liaison with AACRAO’s National Council on the Evaluation of Foreign Educational Credentials. “An Author’s Guide to Creating AACRAO International Publications” 5-6 (First ed. 2005), available for download at www.aacrao.org/publications/guide_to_creating_international_publications.pdf. If placement recommendations are included, the Council Liaison works with the author to give feedback and the publication is subject to final review by the entire Council. *Id.* at 11-12.

EDGE’s credential advice provides that an Indian Bachelor’s of Commerce degree “represents attainment of a level of education comparable to two to three years of university study in the United States.” EDGE’s credential advice provides that the five years of study required to obtain an Indian Master’s of Commerce degree “represents attainment of a level of education comparable to a bachelor’s degree in the United States.”

Here, the beneficiary’s marks statements show that his Bachelor of Commerce degree is based on three years of study which is less than a four-year bachelor’s degree. The beneficiary’s Master of Commerce is not equivalent to a U.S. Master’s degree and thus the petitioner may only seek to rely on the certified alternate level of experience and education of a bachelor’s degree plus five years of experience as a programmer analyst or in an alternate occupation. *See Tisco Group v. Napolitano*, 2010 WL 3464314, No. 09-10072 (E.D. Mich. Aug. 30, 2010) (holding that the petitioner had not explained how five years of study in India was the equivalent to the six years of study typically required for a U.S. Master’s degree and that the AAO’s reliance upon EDGE was appropriate).

Based on the equivalency stated by EDGE, the beneficiary’s Master’s of Commerce degree would be accepted as the equivalent to the required bachelor’s degree in Commerce specified by the terms of the labor certification. Therefore, the petitioner can establish that the beneficiary has the alternate required level of education of a bachelor’s degree.

8 C.F.R. § 204.5(k)(2) states that “A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master’s degree.” The ETA Form 9089 requires five years of experience in addition to the bachelor’s degree. The beneficiary stated his experience on ETA Form 9089 as employment with the petitioner starting on November 15, 2005 to the present (the date the labor certification was accepted for filing, July 25, 2007) and from October 15, 2004 to October 9, 2005 with [REDACTED]. The petitioner submitted a letter signed by [REDACTED] stating that the beneficiary worked in a full-time capacity for the petitioner from October 2005 to the date of the letter, July 24, 2008. *See Matter of Wing’s Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

The petitioner also submitted a letter from [REDACTED] India stating that the beneficiary worked from February 2002 to November 2004 as an [REDACTED]. The letter had an illegible signature with no other identification of the signatory, no date, and no description of job duties to determine if he worked as a programmer analyst or whether the beneficiary was employed

in a full-time or part-time capacity. See 8 C.F.R. § 204.5(k)(3)(i)(B) (“the petition must be accompanied by . . . evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty”). This letter is insufficient to establish that the beneficiary has the two years and six months of experience claimed. In addition, the beneficiary failed to list this experience on ETA Form 9089. *Matter of Leung*, 16 I&N Dec. 2530 (BIA 1976) (the BIA in dicta notes that the beneficiary’s experience, without such fact certified by DOL on the beneficiary’s Form ETA 750 (labor certification), lessens the credibility of the evidence and facts asserted).

The petitioner also submitted a letter dated October 15, 2004 from [REDACTED] in connection with an H-1B filing, however, this letter was not a letter regarding the beneficiary’s experience but was instead a letter welcoming the beneficiary to the firm as an employee. No further letter from [REDACTED] was submitted to show that the beneficiary actually worked for the company or for how long. The petitioner did not submit any Forms W-2 to document the beneficiary’s employment which might have confirmed full-time employment based on the rate of pay. As a result, it is insufficient to demonstrate any experience. [REDACTED] submitted a letter dated July 24, 2008 stating that the beneficiary worked for [REDACTED] from October 15, 2004 to October 9, 2005, however, no showing was made that [REDACTED] was employed by [REDACTED] or otherwise had first hand knowledge of the beneficiary’s previous employment. Additionally, Form G-325A submitted with the beneficiary’s I-485 Adjustment application states that the beneficiary began employment with [REDACTED] in December 2004, not October 2004, and that his employment ended in September 2005. “It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice.” *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).

As a result, we are unable to conclude that the beneficiary had the necessary five years of prior experience at the time the labor certification was accepted by the DOL.

As the petitioner can establish that the beneficiary has the required education, but has not had the opportunity to address the issue related to the beneficiary’s experience, the petition will be remanded to the director. The director may request additional evidence if determined necessary. In view of the foregoing, the case is remanded to the director for consideration of the issues stated above. If the director requests any additional evidence considered pertinent, the petitioner may be provided a reasonable period of time to be determined by the director to submit a response. In that event, upon receipt of all the evidence, the director will review the entire record and enter a new decision.

ORDER: The director’s decision is withdrawn; however, the petition is currently unapprovable for the reasons discussed above, and therefore the AAO may not approve the petition at this time. Because the petition is not approvable, the petition is remanded to the director for issuance of a new, detailed decision which, if adverse to the petitioner, is to be certified to the Administrative Appeals Office for review.